91-1243

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KENNETH LEE MCDONALD,
Petitioner,

VS.

THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether the Court of Appeals for the Eleventh Circuit has abandoned the "personal fault" requirement for imposing Section 6672 penal liability required by this Court in *Slodov v. United States*, 436 U.S. 236 (1978).

PARTIES TO THE PROCEEDING

The petitioner in this application for a writ of certiorari to review the reversal of a jury verdict in a tax assessment case by the Eleventh Circuit Court of Appeals is Kenneth L. McDonald. The respondent is the United States of America.

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Petitioner requests that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above proceedings on August 21, 1991, and for which Rehearing was denied on October 31, 1991.[1]

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 939 F.2d 916 (11th Cir. 1991) and is reprinted in the appendix hereto, p. A-3—A-8, *infra*. There was no opinion issued by the United

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[1] This case ostensibly represents the first petition for review by a taxpayer having a jury verdict in his favor reversed by an appellate court filed since this Court's decision in *Slodov v. United States*, 436 U.S. 236 (1978).

States District Court in denying the Government's request for a new trial and for a judgment notwithstanding the verdict in favor of petitioner.

JURISDICTION

The decision of the Court of Appeals was entered on August 21, 1991, and the request for Rehearing was denied on October 31, 1991. This Court has jurisdiction to review the decision of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Section 6672 of the Internal Revenue Code of 1954 (26 U.S.C.). Under this section a person is personally liable for unpaid taxes withheld from the earnings of employees if he is an officer or an employee of a corporation who is under a duty to collect and pay over the taxes to the government. A responsible person who willfully fails to collect, account for, or remit the withheld taxes is subject to the penal provisions of Section 6672. The relevant statutory provisions involved in this petition, including Section 7501, are reprinted in the appendix hereto, pp. A-1—A-2, *infra*.

STATEMENT OF THE CASE

The issue raised in this Petition is of great importance to the hundreds of taxpayers involved in Section 6672 litigation against the federal government each year. The present case typifies the ongoing erosion of the "personal fault" requirement that this Court found necessary in *Slodov v. United States*, 436 U.S. 238 (1978) in order to support the penal sanctions of Section 6672. Indeed the present direction of decisions from the Court of Appeals for the Eleventh Circuit is to abrogate "personal fault" requirement and transform Section 6672 into an alternate collec-

tion mechanism by making it a civil, strict liability statute. This mistaken interpretation and refusal to follow the stated requirements in the *Slodov* decision will impose the severe penalties of Section 6672 against taxpayers who are faultless or powerless when creditor banks step in and effectively exercise complete financial management over corporate affairs.

After the *Slodov* decision the Court of Appeals for the Eleventh Circuit has somewhat consistently substituted its appellate judgment of the facts for that of the jury by reversing jury verdicts in favor of the taxpayer. *Williams v. United States*,[2] 931 F.2d 805 (11th Cir. 1991); *Smith v. United States*, 894 F.2d 1549 (11th Cir. 1990); *Thibodeau v. United States*, 828 F.2d 1499 (11th Cir. 1987); *Roth v. United States*, 779 F.2d 1567 (11th Cir. 1986). The "personal fault" requirement of *Slodov* has been diminished to the point in which "knowledge" alone suffices to impose the Section 6672 penalty.

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[2] The *Williams* case represents the grossest injustice toward a taxpayer of all of the decisions from the Court of Appeals for the Eleventh Circuit to date. In *Williams* the depository, creditor bank refused to accept the corporation's withholding tax deposits. Thereafter the corporation mailed the withholding tax payments directly to the IRS. The depository, creditor bank returned these checks for insufficient funds. At the same time the depository, creditor bank held effective management control over the decisions as to which payments to creditors would be accepted. The corporation's bank account also was garnished by a corporate creditor. The IRS did not pursue the depository, creditor bank for its role in selectively paying certain creditors, instead assessing the Section 6672 against only the corporate officers.

In Petitioner's case the panel relied exclusively on the *Williams* decision noting "[b]ecause the facts in *Williams* are so similar to those in this case, we find that we are bound to follow the result in *Williams*." *McDonald*, 939 F.2d at 919.

A. Course of Proceedings Below

Petitioner filed this suit to recover $48,746.08 which he had paid on a penalty of $111,511.13 imposed against him pursuant to Section 6672 of the Internal Revenue Code of 1954. The penalty was assessed for his failure to collect and pay over federal employment taxes withheld from the wages of the employees of Environmental Protection Systems, Inc. (hereinafter referred to as "EPS") for the first, third and fourth quarters of 1984. The United States filed a counterclaim against Petitioner for the unpaid balance of the assessment.

The case was tried to a jury which returned special interrogatory answers that Petitioner did not act "willfully" with respect to the stated quarters. The jury returned answers to the following Special Interrogatories:

With respect to the tax period involving the Third Quarter of 1984 —

> INTERROGATORY NO. 1: Do you, the jury, find that Mr. McDonald was a person required to collect, truthfully account for, or pay over taxes to the government during the third taxable quarter of 1984?
> *RESPONSE: YES.*
>
> INTERROGATORY NO. 2: Do you, the jury, find that Mr. McDonald acted willfully in failing to collect, truthfully account for or pay over taxes to the government during the third taxable quarter of 1984?
> *RESPONSE: NO.*
>
> INTERROGATORY NO. 3: If you have determined that Mr. McDonald after learning of the tax deficiency knowingly allowed payments to other creditors of Environmental Protection Services, Inc., while acting as a responsible

person for EPS, what was the total amount of said payments?
RESPONSE: $62,781.55.

INTERROGATORY NO. 4: Do you, the jury, find that Mr. McDonald was a person required to collect, truthfully account for, or pay over taxes to the government during the fourth taxable quarter of 1984?
RESPONSE: YES.

INTERROGATORY NO. 5: Do you, the jury, find that Mr. McDonald acted willfully in failing to collect, truthfully account for or pay over taxes to the government during the fourth taxable quarter of 1984?
RESPONSE: NO.

Based upon the jury responses the district court entered a judgment in favor of Petitioner on his claim for refund and in Petitioner's favor on the Government's counterclaim. The Government, having moved for a directed verdict, thereafter moved for judgment notwithstanding the verdict which was denied on July 5, 1990.

The Government perfected an appeal to the Court of Appeals for the Eleventh Circuit challenging the denial of the directed verdict and judgment notwithstanding the verdict on the issue of Petitioner's "willfulness." On August 21, 1991, the appellate panel reversed the jury verdict and remanded the case for entry of a judgment notwithstanding the verdict against Petitioner for payroll taxes for the third and fourth quarters of 1984. Rehearing and En Bank consideration were subsequently denied.

B. Statement of the Facts

Petitioner was president and a one-third owner of Environmental Protection Systems, Inc., ("EPS"), a Tennessee corpora-

tion engaged in asbestos removal projects. While Petitioner was president the day-to-day administration of the corporation's financial affairs were handled by the company's comptroller. Petitioner's role as president was mostly the result of requirements by the company's bonding surety.

The banking and credit extensions to EPS's were handled by First Alabama Bank of Athens, Alabama. With respect to each of the quarters involved in the Section 6672 penalties, First Alabama held a security interest in all accounts receivable, contract rights, inventory and chattel paper. First Alabama Bank was also the depository institution for EPS' operating and payroll account. The bank also served as a depository for the EPS withholding tax deposits.

Petitioner first learned that there were delinquent tax payments in a meeting at First Alabama Bank in August 1984. During that meeting, the company comptroller for the first time displayed to the officers of EPS a series of checks he had written for federal tax deposits but which First Alabama Bank refused to process. From that time forward, the bank president made the decisions on what checks drawn by EPS would be honored. The bank president refused to honor timely issued checks for withholding tax payments from the EPS checking accounts.

Petitioner introduced each and every check written by EPS from both the Operating and Payroll accounts for the year 1984. Aside from two checks signed by Petitioner in early 1984, none of the over 6,000 checks were signed by him. Further Petitioner never approved any of the checks that were issued after July, 1984, when the bank assumed control. The undisputed testimony also established that Petitioner took no funds out of EPS for his own personal use. The practical realities once the bank assumed control over EPS's receivables were that Petitioner had no viable voice to override what the bank elected to pay or not pay.

The uncontradicted facts also showed that at the point in time which Petitioner first learned of the tax deficiency, there were no unencumbered funds available or sufficient to pay the delinquent taxes. The Government offered no witnesses in the presentation of its case. The Government's sole evidence was the introduction of the assessment notice as a documentary exhibit to the case.

C. Decision Of The District Court

The district court in denying the Government's request for new trial and for judgment notwithstanding the verdict did not issue any memorandum opinion. The jury found through special interrogatories that Petitioner was a "responsible person" with respect to EPS' nonpayment of withholding taxes but that he did not act "willfully" as required by Section 6672.

D. Decision Of The Court of Appeals

On August 31, 1990, the Government appealed the district court's denial of a new trial and denial of judgment notwithstanding the verdict. On August 21, 1991, the Court of Appeals for the Eleventh Circuit reversed the district court and remanded the case for entry of a judgment notwithstanding the verdict in favor of the United States and against Petitioner. The Court of Appeals held that in view of the recently announced decision in *Williams v. United States*, 931 F.2d 805 (11th Cir. 1991) and the similarity of facts between the cases that it was bound to follow the result in *Williams*. The Court of Appeals held that in situations in which creditor banks assume full and effective control over the financial management of the corporation's affairs, including the decision of which creditors to pay, that knowledge by the taxpayer without affirmative action is sufficient to impose the civil penalty provisions of Section 6672.

The Court of Appeals denied Rehearing and En Banc consideration on October 31, 1991, despite the apparent conflict within the Circuit[3] and the holding by this Court in *Slodov v. United States,* 436 U.S. 238 (1978) that Section 6672 penalties are predicated upon a requirement that "personal fault" be present.

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[3] There is a striking and irreconcilable conflict between the Court of Appeals decision in *George v. United States,* 819 F.2d 1008 (11th Cir. 1987) and the *Williams/McDonald* decisions. In *George* the Court of Appeals chastised the district court for not permitting the jury to decide the issue of the taxpayer's "willfulness." The Court of Appeals relied heavily upon the facts that the taxpayer did not prepare or file the payroll tax returns and that the taxpayer had not appropriated any corporate assets for his own benefit. *Id.* at 1013. The Court of Appeals held unequivocally that "the question of the taxpayer's willfulness requires a factual determination which should have been made by the jury." *Id.* at 1014.

Despite these same factors being present in both *Williams* and *McDonald* the Court of Appeals chose to intervene in the factual determination of these cases to set aside the jury's determinations on the "willfulness" issue. Moreover, both *Williams* and *McDonald* exhibited significant exculpating circumstances not present in *George* — the intervention and assumption of complete financial control by depository, creditor banks.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The question presented in this Petition falls within the grounds for securing the issuance of a Writ of Certiorari provided by Rule 17.1(c). The Court of Appeals for the Eleventh Circuit has decided a federal question in a way that conflicts with applicable decisions of this Court. There is a conflict between this Court's decision in *Slodov* and the underlying decision of the Eleventh Circuit Court of Appeals. The conflict is both direct and apparent in that the Eleventh Circuit has now abrogated the requirement announced in *Slodov* that "personal fault" must exist before Section 6672 civil penalties apply. The combination of the Eleventh Circuit's decision in this case and their decision in *Williams v. United States,* 931 F.2d 805 (11th Cir.1991) has transformed Section 6672 into a civil strict liability collection statute instead of the civil penalty statute for which it was intended. This Court should exercise its supervisory authority to issue a uniform rule and correct the misapplication of Section 6672.

I

CERTIORARI SHOULD BE GRANTED TO REVIEW THE ABROGATION OF THE *SLODOV* "PERSONAL FAULT" REQUIREMENT FOR SECTION 6672 PENALTY LIABILITY BY THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

A. "Personal Fault" is a necessary requirement for the imposition of Section 6672 penalty liability.

This Court should grant the writ of certiorari in order to resolve a fundamental erosion of the "personal fault" requirement found by this Court to be an essential and necessary

element before the penal provisions of Section 6672 apply. The lower appellate courts have since this Court's decision in *Slodov v. United States*, consistently eroded the benchmark requirement of "personal fault" to the extent that a taxpayer's mere knowledge that the involved corporation had defaulted in payment of withholding taxes while payment was made to other creditors is sufficient to impose the penalty.

Section 6672 of the Internal Revenue Code provides for the assessment of a 100% penalty against responsible persons who willfully fail to collect and pay over the "trust fund" portion of the employment tax.[4] The penalty is assessed for the failure to collect and pay over the tax imposed upon another where there is a statutory duty to collect and withhold taxes and pay them over. The penalty is 100% of the amount of tax which is not collected, or not accounted for and paid over, and is in addition to any other penalties that may be assessed. The penalty has been traditionally assessed against officers or directors of a corporate employer when the corporation defaults in payments of withholding taxes. "Should employers fail to pay trust fund taxes, the Government may collect an equivalent sum directly from the officers or employees of the employer who are responsible for collecting the tax." *United States v. Energy Resources Co., Inc.*, 495 U.S. 545, 547 (1990).

There are two elements of liability under Section 6672 before the penalty can be imposed. First, the person upon whom liability is to be imposed must have been a person required to

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[4] Because the employment taxes which are withheld from the wages of employees are considered to be held in trust for the Government under I.R.C. Section 7501, the general terminology is to refer to these taxes as "trust-funds." *United States v. Energy Resources Co., Inc.*, 495 U.S. 545, 546 (1990).

The full provision of I.R.C. Section 6672(A) is set forth in the Appendix at page A-1.

collect, account for and pay over any tax — a "responsible person." The second is that such a responsible person must have "willfully" failed to collect and pay over the taxes. As Justice Marshall noted:

> No corporate officers, regardless of title, can be held liable under Internal Revenue Code § 6672 unless his position was sufficiently important that he was "required to collect, truthfully account for, and pay over "withholding taxes" and unless he "willfully fail[ed]" to meet one or more of these obligations.

United States v. Sotelo, 436 U.S. 268, 280 (1978).

Section 6672 is a penalty provision and not an alternate tax collection device. As Justice Rehnquist has observed the penalty provision of Section 6672 "imposes a potentially crushing liability on corporate officials — a liability that is nondischargeable (in bankruptcy) in its entirety and virtually in perpetuity." *Sotelo,* 436 U.S. at 290 (Rehnquist, J., dissenting).

The legislative history of Section 6672 confirms the penal nature of the statute. Nearly identical language to the present Section 6672 first appeared as a criminal provision in Section 1308 of the Revenue Act of 1918 applying to excise taxes. Revenue Act of 1918, ch. 18 § 1308, 40 Stat. 1057, 1143. In 1935 the Social Security Act incorporated all of the penalties for excise taxes and made them applicable to the social security taxes. Act of Aug. 14, 1935, ch. 531, § 807(c), 49 Stat. 620, 638. Congress in 1954 reorganized the Internal Revenue Code. The 100 percent penalty was removed from the other criminal penalties since it did not provide for imprisonment. As part of this restructuring, the 100 percent penalty was renumbered as Section 6672 and placed alongside the other relevant sections imposing civil penalties.[5] *See* Moran, *Willfulness: The Inner*

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[5] The civil penalty imposed by Section 6672 can far exceed the maximum

(Footnote 5 continued on next page)

Sanctum or Unnecessary Element of Section 6672, 11 U. Tol. L. Rev. 709 (1980).

This Court has always recognized that Section 6672 was intended by Congress to be a "penalty" and not a "tax" collecting device. As Chief Justice Rehnquist has reflected:

> The liability imposed [by Section 6672] is specifically denominated a "penalty" and, absent any indication to the contrary, Congress is presumed to know the meaning of the words it uses, especially in highly complex and intricate statutory schemes.

Sotelo, 436 U.S. at 286-87 (Rehnquist, J., dissenting).

The Court in its seminal Section 6672 decision in *Slodov v. United States*, 436 U.S. 238 (1978) recognized the penal nature of the 100 percent penalty and stated categorically that the penalty would not apply absent "personal fault" by the taxpayer. In relevant language the Court stated:

> Section 6672 cannot be read as imposing upon the responsible person an absolute duty to "pay over" amounts which should have been collected and withheld. The fact that the provision imposes a "penalty" and is violated only by a "willful failure" is itself strong evidence that it was not intended to impose liability without personal fault. Congress moreover, has not made corporate officers personally liable for the corporation's tax obligations generally, and § 6672 therefore should be construed in a way which respects

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Footnote 5 Continued)

criminal penalty for fraud or tax evasion. The maximum criminal penalty fortax fraud or evasion is generally $100,000 whereas the Section 672 penalty is unlimited. Hungerford, *Howard v. United States: Who Should Be Responsible For the 100 Percent Penalty?*, 12 U. Puget Sound L. Rev. 451 (1989). The penalty assessed against Petitioner exceeded $100,000.

> that policy choice. The Government's concession — that § 6672 does not impose a duty on the responsible officer to use personal funds or even to liquidate corporate assets to satisfy the tax obligations — recognizes that the "pay over" requirement does not impose an absolute duty on the responsible person to pay back taxes.

Id. at 254.

The Court of Appeals for the Eleventh Circuit in *Williams v. United States*, 931 F.2d 805 (11th Cir. 1991) and *McDonald v. United States*, 939 F.2d 916 (11th Cir. 1991), has now abrogated the requirement that "personal fault" exist and has transformed Section 6672 into an alternate tax collection device. Despite facts in each case that creditor banks took over the financial management of the corporate employer and that the assessed taxpayer was powerless to contramand the decisions as to which creditors to pay, the Court of Appeals for the Eleventh Circuit has now determined that "knowledge" alone can suffice to impose the penalty. The appellate court has used the "knowledge" sword to thwart jury determinations that "willful" conduct as envisioned by Section 6672 did not exist under the facts of each case.

The Court of Appeals decision in *Williams* served as the principal controlling authority basis for the appellate court's reversing the judgment in favor of Petitioner at trial. *McDonald*, 939 F.2d at 919. In *Williams* the taxpayer's supposed "personal fault" for the nonpayment of withholding taxes was exhibited in the following conduct:

> The federal employment taxes withheld from the wages of AIR employees in the third quarter of 1983 were due to be paid in October, 1983. Accordingly, AIR submitted these tax payments directly to the Bank for deposit in an Internal Revenue Service ("IRS") account. However, on several occasions the Bank would not accept these withholding tax

> payments because AIR's account did not contain sufficient funds. When this occurred, House informed Boles and Tony Cashio ("Cashio"), a commercial loan officer at the Bank, that because they had chosen to extend credit to AIR for the amount of the payroll checks, they also must extend credit for the withholding tax payments. When the Bank remained reluctant to accept the withholding tax payments, House mailed payments directly to the IRS. However, because the Bank continued to sweep AIR's account, several checks made payable to the IRS were returned for insufficient funds. When House learned that AIR's withholding tax payments were past due, he again spoke to Cashio and Boles about their failure to make funds available for withholding tax payments.
>
> The Bank demanded full payment of AIR's outstanding loans on January 26, 1984. Because AIR was unable to meet this demand, the Bank placed AIR into "liquidation mode." The Bank contacted AIR's account debtors, instructing them to remit their payments directly to the Bank. The Bank deposited the amounts received in AIR's general depository account, swept the account, and applied most of the money to pay down AIR's loans from the Bank. The Bank also allowed payments to AIR's employees and to those of AIR's creditors whose continued services were necessary for AIR to remain in business. During this time, House met with Boles on several occasions, attempting to make withholding tax payments on behalf of AIR. Boles would not accept the tax deposit checks, claiming that after the Bank swept AIR's account there was money sufficient to satisfy only AIR's payroll expenses, not the outstanding withholding taxes.

Id. at 807-08. Against this evidentiary record it is easy to discern how a jury could reach the conclusion that the taxpayer's conduct was not "willful" as required under *Slodov*.

The factual record in Petitioner's case is no less offending to the "personal fault" requirement. As noted by the appellate court on the critical factual issues —

> * "First Alabama informed EPS that EPS would have to find another source for funds to cover the payroll taxes. As a practical matter, however, EPS had little opportunity to locate other sources of credit because First Alabama held security interests in all of the company's contracts and income. Payments from customers to EPS were going directly to First Alabama, which applied the money to reduce EPS's outstanding debt." 939 F.2d at 918.
>
> * "Although EPS continued to issue checks on a weekly basis to cover its federal employment tax deposits the bank declined to honor them. However, the bank honored other checks payable to creditors whose services were necessary to maintain EPS's operations." *Id.*
>
> * "McDonald asserted, however, that First Alabama, not EPS, was responsible for the company's payroll tax default because the bank controlled the company's funds and advanced only enough money to pay net wages. McDonald attempted to establish that the tax deficiency was not due to any action by EPS, but to the bank's selective decisions to refuse to honor checks issued by EPS to pay federal employment taxes." *Id.*

It is noteworthy that in view of Petitioner's trial presentation the Government offered no witnesses to support its counterclaim and summarily rested after introducing a copy of the Section 6672 assessment into evidence. Not surprisingly the jury found that Petitioner's conduct did not constitute "willfulness" under the statute. The district court also concurred with the jury by denying the Government's post trial motions.

The *Williams* and *McDonald* decisions are reflective of a mounting trend by the appellate courts toward discarding "per-

sonal fault" and permitting Section 6672 to serve as a convenient collection device for unpaid taxes. At the very least, the Court should grant certiorari to forestall the further transformation of Section 6672 away from its penal intent. The harsh and unintended consequences of appellate courts applying Section 6672 in situations where faultless taxpayers have their decisions and authority usurped by creditor banks — institutions not pursued by the IRS — certainly justifies review by this Court.

B. The Court of Appeals failed to give due regard to the jury decision that "personal fault" was not present.

The Court of Appeals for the Eleventh Circuit has principally led the appeliate way in converting Section 6672 from a civil penal provision into a collection device employable by the Internal Revenue Service to recoup delinquent employment taxes. *McDonald v. United States,* 939 F.2d 916 (11th Cir. 1991); *Williams v. United States,* 931 F.2d 805 (11th Cir. 1991); *Smith v. United States,* 894 F.2d 1549 (11th Cir. 1990); *Thibodeau v. United States,* 828 F.2d 1499 (11th Cir. 1987); *Roth v. United States,* 779 F.2d 1567 (11th Cir. 1986). While the Eleventh Circuit has pioneered the elimination of "personal fault" as a requirement, other courts of appeal have also begun following the path. *See Hochstein v. United States,* 900 F.2d 543 (2nd Cir. 1990); *Collins v. United States,* 894 F.2d 740 (6th Cir. 1988); *Bowen v. United States,* 836 F.2d 965 (5th Cir. 1988).

Each of these cases bear a striking resemblance. In each case the jury as the ultimate fact finder found the requirements for imposing the Section 6672 penalty against the taxpayer were not present in the Government's case.[6] Further, the district courts from their supervisory positions over the trial proceeding have

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[6] In many cases, such as Petitioner's, the Government's sole evidence consists of the introduction of the Notice of Tax Assessment.

thrice declined to overrule the fact finding of the jury. The district courts denied motions for directed verdicts, motions for judgments notwithstanding the verdicts, and motions for new trials. In each case the appellate courts overrode these trial determinations directing the imposition of the Section 6672 penalty.

The intervention by a court of appeals to overturn a determination by the fact-finder is suspect. The Court has clearly delineated that the federal appellate courts may set aside findings of fact only if they are "clearly erroneous." *Amadeo v. Zant,* 486 U.S. 214, 222 (1988). Likewise, after a district court reviews the fact finding by the jury and determines that the jury determination is within the confines of applicable law, the appellate courts may only reverse under an abuse-of-discretion standard. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 279 (1989); *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 556 (1984).

As Justice O'Connor has noted:

> By rejecting the District Court's findings simply because it would have given more weight to evidence of mislabeling than did the trial court, the Court of Appeals clearly erred. Determining the weight and credibility of the evidence is the special province of the trier of fact.

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 856 (1982). Justice White echoed this standard when he wrote for the Court:

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court.

Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 573 (1985).

The present trend of these Section 6672 cases in the appellate courts is to make the district court proceedings a mere "tryout on the road" rather than the "main event" for the fact finding. *See Wainwright v. Sykes,* 433 U.S. 72,90 (1977). The appellate courts are now improperly conducting what amounts to de novo weighing of evidence.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit.

Dated: January 28, 1992
Sheffield, Alabama

Respectfully submitted,

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APPENDIX

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KENNETH LEE MCDONALD,
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THE UNITED STATES OF AMERICA,
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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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STATUTORY PROVISION INVOLVED

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APPENDIX A

THE INTERNAL REVENUE CODE OF 1954 (26 U.S.C.)

SECTION 6672. Failure To Collect And Pay Over Tax, Or Attempt To Evade Or Defeat Tax.

(a) [as amended by Sec. 9(a), Act of November 10, 1978, Publ. L. No. 95-628, 92 Stat. 3624] *General Rule.* Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

APPENDIX B

THE INTERNAL REVENUE CODE OF 1954 (26 U.S.C.)

SECTION 7501. Liability For Taxes Withheld Or Collected.

(a) *General Rule.* —Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

APPENDIX C

Kenneth Lee McDONALD,
Plaintiff-Counter-Defendant, Appellee,

v.

UNITED STATES of America,
Defendant-Counter-Plaintiff, Appellant.

No. 90-7631.

United States Court of Appeals,
Eleventh Circuit.

Aug. 21, 1991.

Appeal from the United States District Court
for the Northern District of Alabama.

Before ANDERSON and DUBINA, Circuit Judges, and GIBSON, Senior Circuit Judge. [Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation]

PER CURIAM:

In this appeal, the United States seeks reversal of a judgment absolving appellee Kenneth McDonald from liability under § 6672 of the Internal Revenue Code for nonpayment of federal employment taxes from the wages of the employees of Environmental Protection Systems, Inc., a company that McDonald partially owned and of which he was president. The district court entered judgment in favor of McDonald on the basis of special interrogatory findings by a jury that although McDonald was responsible for the withholding and payment of the unpaid employment taxes, he had not "willfully" failed to pay them. The United States argues that the evidence presented at trial established that McDonald acted "willfully" as a matter of law and, therefore, that the district court erred in denying the government's

motions for directed verdict and for judgment notwithstanding the verdict at the close of trial. We reverse the district court and remand for entry of judgment in favor of the United States.

FACTS

Appellee Kenneth McDonald was president and on-third owner of Environmental Protection Systems ("EPS"), a Tennessee corporation formed in 1983 to perform on-site labor under a contract between the State of Alabama and Acoustical Installers, Inc. ("Acoustical"), an asbestos removal firm of which McDonald was also president and part owner. Although McDonald was president of EPS, Johnny Pitmon, the comptroller, handled the day-to-day administration of the company's finances.

In April of 1984, McDonald, acting as president of Acoustical and EPS, negotiated and executed a financing contract with First Alabama Bank of Athens, Alabama ("First Alabama"). Under the contract, First Alabama agreed to provide EPS with a $350,000 line of credit in exchange for security interests in all of EPS's accounts receivable, contract rights, inventory and chattel paper. The bank also required that any future payments from the State of Alabama to EPS be made payable jointly to Acoustical and First Alabama. The chief purpose of this line of credit was to provide short-term funding for EPS's operations until the company received payment for its work. The State of Alabama, for which EPS performed most of its work, was often slow to make payment, and the credit line enabled EPS to meet its operating expenses in the interim.

With respect to the withholding and payment of federal employment taxes, EPS's line of credit operated as follows. EPS had two accounts at First Alabama, one for general operating expenses and another for payroll. When EPS requested a "draw" from its line of credit, First Alabama deposited money into EPS's general operating account. If a payroll distribution was ap-

proaching, EPS issued two separate checks from its general operating account. EPS issued the first check in an amount equal to the net wages of all of its employees and deposited the check into the payroll account. Individual paychecks for each employee were then drawn from the payroll account. EPS issued the second check from the general operating account in an amount equal to the total federal employment taxes due from its payroll and deposited this check at First Alabama, an authorized federal depository for holding withheld employment taxes.

In July of 1984, First Alabama expressed concern that EPS was overextended and that its line of credit would not be repaid. The president of First Alabama notified McDonald and other officers of EPS that henceforth the bank would loan EPS only enough money to cover the company's "net" payroll, that is, enough money to cover the employees' net wages but not the additional amount necessary to cover the withholding for their federal employment tax. First Alabama informed EPS that EPS would have to find another source for the funds to cover the payroll taxes. As a practical matter, however, EPS had little opportunity to locate other sources of credit because First Alabama held security interests in all of the company's contracts and income. Payment from customers to EPS were going directly to First Alabama, which applied the money to reduce EPS's outstanding debt.

Despite its problems, EPS remained in business, with First Alabama's approval, until late 1984. During this time, the company continued to pay wages to its employees for their work in completing projects already in progress. First Alabama either deposited money directly into EPS's payroll account or permitted EPS to overdraw its payroll account in amounts sufficient to pay the employees' net wages. Although EPS continued to issue checks on a weekly basis to cover its federal employment tax deposits, the bank declined to honor them. However, the bank honored other checks payable to creditors whose services were necessary to maintain EPS's operations.

Due to EPS's failure to pay its federal employment taxes, the IRS assessed a penalty against McDonald under I.R.C. § 6672 in the amount of $111,511.13, the total of the unpaid withholding taxes for the first, third and fourth quarters of 1984. McDonald paid a portion of this penalty and subsequently filed this action in federal district court contesting his liability and requesting a refund of the amount he had paid. The United States filed a counterclaim against McDonald for the unpaid portion of the penalty.

COURSE OF PROCEEDINGS

This case was tried before a jury in federal district court. At trial, EPS comptroller Johnny Pitmon testified that the first period for which EPS failed to deposit its federal employment withholding taxes was the week of July 13, 1984. Pitmon testified that McDonald knew in July of 1984 that the withholding taxes were delinquent, that the company did not have the money to pay them, that the bank would not advance money for that purpose, and that EPS paid other creditors while the taxes remained unpaid. Gary Newby, a shareholder and officer of EPS, testified similarly regarding McDonald's awareness of the tax deficiency.

McDonald testified that he had learned of the tax delinquency in July of 1984 at a meeting between the president of First Alabama and the officers of EPS, including himself. He further testified that EPS had continued to pay wages to its employees after he had learned of the company's inability to pay its federal employment withholding tax, thereby becoming increasingly delinquent. McDonald asserted, however, that First Alabama, not EPS, was responsible for the company's payroll tax default because the bank controlled the company's funds and advanced only enough money to pay net wages. McDonald attempted to establish that the tax deficiency was not due to any action by EPS, but to the bank's selective decisions to refuse to honor the checks issued by EPS to pay federal employment taxes.

At the close of evidence, the United States moved for a directed verdict, arguing that the evidence had established as a matter of law that McDonald was a "responsible person" for the unpaid withholding taxes for the third and fourth quarters of 1984 and that his failure to pay was "willful." The district court denied this motion. [The government also argues that the district court erred in instructing the jury that First Alabama's behavior toward EPS could establish a defense of reasonable cause to the government's allegation that McDonald's failure to pay was willful. Because we reverse this case on other grounds, we need not reach this issue.] The jury found through special interrogatories that McDonald was a "responsible person" with respect to EPS's nonpayment of federal withholding taxes but that he had not acted "willfully" in defaulting on the tax payments. In accordance with those findings, the district court entered judgment in favor of McDonald, refunding to him the amount that he had already paid to the government and dismissing the government's counterclaim for the remaining balance of the § 6672 penalty. The district court subsequently denied the United States' motion for either judgment notwithstanding the verdict or a new trial. This appeal follows.

DISCUSSION

The dispositive issue in this case is whether the government established as a matter of law that McDonald's failure to remit federal employment taxes was "willful" under § 6672. The government argues that the district court erred in denying its motion for a judgment notwithstanding the verdict because the evidence at trial established that McDonald was aware that EPS had defaulted on its federal payroll taxes and that EPS nevertheless continued to operate and to pay other creditors while the taxes remained unpaid. The government asserts that once McDonald's knowledge of these facts is proven, McDonald's failure to remit payroll taxes was "willful" as a matter of law. *See Smith v. United States,* 894 F.2d 1549, 1553 (11th Cir.1990).

McDonald's sole argument is that his nonpayment of payroll taxes was not willful because First Alabama held complete control over EPS's money. In *Williams v. United States,* 931 F.2d 805 (11th Cir.1991), a recent panel of this court expressly rejected the same argument. Because the facts in *Williams* are so similar to those in this case, we find that we are bound to follow the result in *Williams*. Therefore, we hold that McDonald "willfully" failed to remit federal payroll taxes as a matter of law because he was aware that EPS had defaulted in its payment of employment taxes and nevertheless acquiesced in EPS's continued payment to other creditors while the taxes remained unpaid.

For the foregoing reasons, the judgment of the district court is reversed and this case is remanded for entry of a judgment notwithstanding the verdict in favor of the United States and against McDonald to reflect his liability for payroll taxes for the third and fourth quarters of 1984.

REVERSED and REMAND